U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

DATE ISSUED: December 22, 1999

CASE NO.: 2000-ERA-2

IN THE MATTER OF

JAMES P. PARKER,
Complainant

v.

STONE & WEBSTER,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Background

Complainant initially filed this Complaint with the Occupational Safety and Health Administration (OSHA)on December 7, 1998, alleging violations of Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24. Specifically, Complainant alleged that he was laid off by Respondents, Stone & Webster, on October 10, 1998, because he raised safety concerns at the Browns Ferry Nuclear Plant.

OSHA investigated the claim against Respondent, and on November 1, 1999, OSHA found that Complainant had failed to show that a violation of the ERA had occurred primarily because the complaints raised by Complainant against Stone & Webster were identical to the complaints raised by him in a previous case against the TVA, which complaint was dismissed by summary judgment. Specifically, OSHA noted that an administrative law judge ruled in Case Number 1999-ERA-13 (T.V.A. v. Parker) that Complainant's request for fire-fighting equipment and previously voiced concerns regarding asbestos, were "not safety protected activity within the meaning of the Energy Reorganization Act...", and accordingly, the complaint allegations were "not within the scope of the Energy Reorganization Act." Because the allegations of Complainant in this

case were identical to the complaints raised against TVA, OSHA found that "protected activity was not established." (Respondent's Exhibit C).

[Page 2]

Complainant appealed the findings of OSHA on November 14, 1999, and on November 26, 1999, I issued a Notice of Hearing and Pre-hearing Order setting a trial date for December 15, 1999. Respondent then filed its Motion for Summary Judgment on December 8, 1999, at which time the trial was rescheduled for January 19, 2000, and Complainant was given until the close of business on December 20, 1999, to show cause why Respondent's Motion should not be granted. Complainant did not respond.

Discussion

In deciding a Motion for Summary Judgment the court must consider all the materials submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party. Fed. R. Civ. Proc. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). An order granting Summary Judgment shall be issued when there is no genuine issue of material fact, the moving part is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. See LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th cir. 1993); United States v. TRW, Inc., 4 F.3d 417, 423 (6th Cir. 1993), cert. denied 114 S.Ct. 11370 (1994).

According to Respondent's allegations and the materials submitted in support thereof, Complainant's allegations against Stone & Webster are identical to the complaints alleged in his previous case against the TVA.[1] The basis of Complainant's complaint in both instances is that he was terminated from Browns Ferry Nuclear Plant after raising concerns that he was not offered appropriate fire fighting equipment as well as asbestos concerns. There have been no additional contentions raised by Complainant and the allegation of retaliatory action based upon these incidents was addressed and dismissed on summary judgment by Administrative Law Judge Kerr on July 30, 1999.[2]

Because no new evidence or additional allegations have been raised by Complainant from those raised in Complainant's case against TVA, I concur with Judge Kerr's assessment of the state of the law and grant summary judgment in this instance because Complainant's alleged protected activity does not fall within the statute or regulations as it is unrelated to nuclear or radiation safety. Parker v. TVA, 1999-ERA-13 (July 30, 1999). In Decresci v. Lukens Steel Co., 87-ERA-13 (Sec'y Dec. 16, 1993), it was explained that not every act of whistleblowing is protected under the ERA simply because the employer holds a license from the NRC, but that a Complainant under the ERA must prove that retaliatory action was taken against him because he engaged in an action or activity related to nuclear safety. While Complainant may have voiced concerns which might be protected under other statutes, his concerns here alleged are not related to nuclear safety issues which qualify as protected activity under the ERA. In other words,

his concerns do not become nuclear related simply because he was employed at a nuclear facility at the time.

[Page 3]

Raising asbestos concerns has been held not to be protected activity under the ERA. See Decresci v. Lukens Steel Co., 87-ERA-13. Second, while Complainant alleges that fire safety issues are protected activity, his apparent reliance upon Stone & Webster v. Herman, 115 F.3d 1568 (11th Cir. 1997) to support his argument is misplaced. In Herman, the court decided only that communication between co-workers was protected under the Act. In this instance, Complainant's channel of communication is not in issue, but only whether his voiced concern was related to nuclear safety. Aside from addressing a different issue, the facts in Herman further reflect Complainant's misplaced reliance. Herman, while employed in a dry well of a reactor at Browns Ferry, raised concerns regarding the administration of the fire safety program implemented to protect the reactor from obvious dangers of fire hazards. In contrast, Complainant here worked in the switchyard and his concern was quite specific and alleged a fire extinguisher was not available in the switchyard area.

Although Complainant apparently endeavors to relate his concern to nuclear safety by attempting to expand this singular incident into an issue touching upon the effectiveness of the fire safety program of the entire facility, including the reactors, it is an unsubstantiated leap. The ERA simply "does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." American Nuclear Resources, Inc. v. United States Department of Labor, 134 F.2d 1292 (6th Cir. 1998).

Conclusion

It is my finding and recommendation that Complainant was not engaged in any protected activity within the meaning of the ERA when he expressed his concerns, and therefore, his complaint is not within the scope of the Energy Reorganization Act.

RECOMMENDED ORDER

Complainant, having alleged no genuine issue of any material fact, Respondent's Motion for Summary Judgment is hereby GRANTED. The hearing scheduled for January 19, 2000, is canceled.

So ORDERED this 22nd day of December, 1999, at Metairie, Louisiana.

C. Richard Avery
Administrative Law Judge

CRA:ac

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C. F. R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N. W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C. F. R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1] Actually, it appears from the records made available that the complaint filed against TVA and Stone & Webster by Complainant were one in the same, but for some reason bifurcated by OSHA, investigated separately, referred to the Office of Administrative Law Judges separately, assigned different case numbers, and assigned at different times to different administrative law judges.

[2] While these identical facts and issues were previously addressed by Judge Kerr, I can not base my decision on collateral estoppel since the decision in TVA v. Parker is not yet final. However, the regulations allow that, in an effort to permit resolution of the issues without unnecessary delay, an administrative law judge may "infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party." 29 C.F.R. 18.6(d)(2)(i); and consequently, because Complainant has failed to respond to Stone & Webster's motion for summary judgment, I do infer that, as Respondent's allege, there are no new allegations or evidence which would substantiate Complainant's efforts to connect his concerns with that of nuclear safety or differentiate his complaints from those alleged in his case against the TVA and that the facts and issues in the two claims are identical.